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No. 92-1061

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE CHRONICLE PUBLISHING COMPANY, ET AL.,
PETITIONERS

v.

R.H. RISON, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal courts may adjudicate the merits of moot cases.

2. Whether petitioner Martin's release on parole moots the claims presented in this case for injunctive and declaratory relief against the enforcement of prison regulations.

3. Whether this case is not moot because damages were sought in the complaint or because petitioner The Chronicle Publishing Company, which had published articles by petitioner Martin while he was imprisoned, alleges a continuing interest in the possible future publication of work by other federal prisoners.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is reported at 962 F.2d 959. The opinion of the district court (Pet. App. 2-40) is reported at 741 F. Supp. 1406.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1992. A petition for rehearing was denied on September 21, 1992. Pet. App. 41-42. The petition for a writ of certiorari was filed on December 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1986 petitioner The Chronicle Publishing Company, publisher of the *San Francisco Chronicle*, published a bylined article submitted by petitioner Martin, at the time a federal prisoner serving consecutive 15 and 18-year sentences for actual and attempted armed bank robbery. The Chronicle mailed Martin a check in payment for the article. Officials at the United States Penitentiary in Lompoc, California, returned the check to the Chronicle, along with a notice of United States Bureau of Prisons (BOP) regulations barring such payments to inmates. Tr. 3-279 to 3-280.[1] Martin decided to violate the regulations by continuing to accept compensation for future articles (and by continuing to permit the Chronicle to publish the articles under his byline). To avoid confrontation with prison officials, payments for the articles were secretly funneled through Martin's attorney. Tr. 3-280, 7-1238. After the first article in 1986 (Tr. 3-280), the Chronicle began publishing articles and reports by Martin about every four to six weeks.

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[1] The regulation involved, 28 C.F.R. 540.20(b), provides that an inmate "may not receive compensation or anything of value for correspondence with the news media. The inmate may not act as a reporter or publish under a byline." Prison regulations do not restrict inmates from submitting articles or information to the Chronicle or other news media for publication. To the contrary, "special mail" procedures authorized by regulation allow inmates (including, at the time, Martin) to send materials to the news media in sealed envelopes, with no inspection by prison officials. See 28 C.F.R. 540.18(c). Moreover, the regulations do not prohibit the use of a pseudonymous byline.

On Sunday, June 19, 1988, the Chronicle published an article by Martin that criticized the prison's administration, "implied that [the warden's] actions had increased tension among prisoners and caused violence," and "contained express statements about murders, assaults, and possible violence or rioting." Pet. 3; Pet. App. 16. The warden, concerned about the security situation at the prison (particularly in the context of major riots that had recently occurred at two other federal prisons), followed the recommendation of his Chief of Security and placed Martin in administrative detention for two days while investigating whether Martin's safety was in jeopardy and whether Martin was attempting to encourage a group demonstration. Several days later, Martin was transferred to another federal prison because of BOP concerns that he would be a catalyst for a disturbance at Lompoc. Pet. App. 31-35.

During the warden's security investigation, prison officials found evidence of the continuing compensation Martin was receiving for his writing. A disciplinary incident report was filed against Martin for "conducting a business * * * while incarcerated."[2] No further action was taken with respect to the report after Martin's transfer. See Gov't C.A. Br. 8.

2. On July 6, 1988, shortly after Martin's transfer, petitioners filed this action in the district court, alleging that the BOP's regulations barring inmates from publishing under a byline, receiving compensation from the news media, or conducting a business

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[2] No inmate is permitted to conduct or engage actively in a business or profession while incarcerated. See 28 C.F.R. 540.14(d), 541.13 (Table 3), 540.45.

(as applied to newspaper writing) were unconstitutional on their face and as applied. Martin also sought damages from the respondent prison officials for their allegedly retaliatory actions in placing him in administrative detention and transferring him to another prison in June 1988. Pet. App. 7. At petitioners' request, the district court entered a temporary restraining order and later a preliminary injunction barring application of the challenged regulations to Martin—and thus permitting the continued publication of articles under his byline—while the litigation was pending. Pet. 5.

Trial commenced in December 1989, and 13 days of testimony were presented. On June 26, 1990, the district court dissolved the preliminary injunction and entered judgment for the respondents. Pet. App. 40. The court observed that the challenged regulations "do not control the content of what is said" and that "no attempt is made to edit, restrain or prevent written material from going out of the prison or from being published." *Id.* at 14. Thus, the regulations restricting bylines, compensation, and the conduct of business "are limited exceptions to the broad grants to prisoners of means for exercising their rights of expression."[3] *Id.* at 20. The court also

[3] 28 C.F.R. 540.20(b) also bars an inmate from "acting as a reporter." This provision, which bars an inmate from working on a regular basis to provide information to the news media for compensation, was never applied to Martin and is irrelevant here. See Tr. 11-74. Even petitioners' expert at trial agreed that such conduct would constitute a real security threat within the prison. Tr. 4-473. Petitioners have not claimed that Martin was a reporter, or that the Chronicle has any interest in hiring an inmate reporter.

recognized the potential dangers to physical security within the prison that were alleviated by the challenged regulations. *Id.* at 15-19. After extensive analysis, the court concluded that the regulations were "rationally related to the legitimate penological objective of prison security," that they gave fair notice to affected parties of the conduct they prohibited, and that they were applied rationally and in good faith on the facts of this case. *Id.* at 22, 24, 38-39. The court therefore found no constitutional infirmity in the regulations on their face or as applied to Martin's conduct. *Id.* at 38-39.

The district court also rejected Martin's contention that his placement in administrative detention and subsequent transfer was intended as retaliatory punishment. It found from the evidence that respondents "acted because of a genuine concern for prison security and for no other reason," Pet. App. 30, and thus denied Martin's claim for damages. See *id.* at 30-35, 38-39.

3. Petitioners appealed. In their briefs and at oral argument petitioners challenged the district court's rulings as to the constitutionality of the regulations, but did not contest the district court's findings rejecting Martin's theory of retaliation and his claim for damages.

In February 1992, Martin was released on parole. He therefore ceased to be subject to the BOP regulations at issue, which restrict the activities of federal inmates only while they are actually incarcerated. At the government's suggestion, and after full briefing by the parties, the court of appeals found that Martin's release had rendered the case

moot. Pet. App. 1. The court therefore vacated the district court's judgment and remanded the case to that court with instructions to dismiss it as moot. *Ibid.*

ARGUMENT

1. Petitioners first contend, Pet. 10-18, that federal courts have the power to decide the merits of moot cases in certain circumstances, and that the court of appeals should have done so in this case. They base their position largely on the fact that considerable resources have already been expended in the course of the litigation, and argue that "the likely precedential effect of a decision on appeal would justify the [further] expenditure of judicial resources necessary to adjudicate the merits." Pet. 13 (quoting Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 605, 656 (1992)).

This Court has made quite clear that "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (citing *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988), and *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). This rule requires that the parties have a "personal stake in the outcome" of the lawsuit. *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983). Absent a class action or a dispute that is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), the requirement of a live controversy between personally interested parties subsists through all stages of federal judicial proceedings, trial and appellate. *E.g.*, *Lewis* v. *Continental Bank Corp.*, 494 U.S. at 477-478; *Los Angeles*

v. *Lyons*, 461 U.S. at 101-102, 109. Petitioners put forward the classic arguments for why one might devise a court system prepared, at least in complex or interesting cases, to offer advisory opinions. However intriguing, those arguments are irrelevant in the face of the contrary system adopted by the Constitution and repeatedly reaffirmed by this Court. See, *e.g.*, *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241 (1937); *Church of Scientology* v. *United States*, 113 S. Ct. 447, 449 (1993).

Even if dismissal were not constitutionally compelled, however, there are no particular circumstances in this case that might counsel a federal court to strain to reach the merits of the case. As the district court found, Pet. App. 14-15, 20, the specific regulations challenged here impose very limited restrictions on the broad privileges of federal inmates to communicate information and written materials to the news media. Inmates are allowed to submit articles and letters for publication without censorship by prison authorities and without restriction as to content. They are not prevented from providing factual material to the news media. In fact, inmates may communicate to the news media through "special mail" that is sealed by the inmate and not subject to inspection by prison authorities. 28 C.F.R. 540.18(c).

The challenged regulations bar only those activities that the BOP views as having the greatest potential for creating security problems within federal prisons, while leaving open as many forms of inmate communication as possible. Indeed, Martin continued to publish articles in the Chronicle even after the adverse judgment of the district court in

this case, subject only to the requirements that he cease using a byline and cease receiving compensation.[4] See Pet. App. 67-68.

Petitioners claim that dismissal is a "pointless waste of judicial resources," because the trial took several weeks and the case had already been briefed and argued in the court of appeals when it became moot. Pet. 16. That argument of course discounts the potential waste of resources of the court of appeals and of this Court in resolving a case which subsequent events have rendered moot. Moreover, while petitioners did challenge the facial constitutionality of several regulations, much of the trial evidence and many of the issues raised on appeal involved specific factual issues of no continuing importance, such as the details of the prison authorities' dealings with Martin and the constitutionality of the regulations as specifically applied to him.

2. Petitioners also contend that Martin's parole does not moot this case, relying on the fact that the terms of his parole might permit future reincarceration on a variety of grounds. Moreover, they assert a

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[4] The observation that the regulations are so limited in scope may account for the fact that the issue of their validity does not arise with any frequency. Indeed, petitioners asserted below that the regulations in issue had never been applied to any inmate other than Martin. Martin C.A. Br. 7, 10. While respondents disputed this specific contention, it is clear that occasion for application of the these regulations arises only rarely. Gov't C.A. Br. 44 & n.35. As the district court stated, "[t]he evidence disclosed perhaps two instances of prisoners who wrote under a byline for a newspaper, although it is questionable whether they had acted as a reporter or received compensation." Pet. App. 27.

conflict among the courts of appeals on this issue. Pet. 18-19. These arguments are without merit.

a. This case is not one whose particular facts disclose a serious issue that is "capable of repetition, yet evades review." *Los Angeles* v. *Lyons*, 461 U.S. at 109; *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). In the absence of a class action, that doctrine is limited to cases meeting each of two conditions: (i) the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and (ii) there must be a reasonable expectation that the same complaining party will again be subjected to the same challenged action. *E.g.*, *Weinstein* v. *Bradford*, 423 U.S. at 149.

The first condition is clearly absent here. Terms of incarceration in federal prisons are not necessarily short, and if other prisoners in the future wish to assert the same claim presented here, there is no reason to believe that they will not have ample time to litigate it. See *Wiggins* v. *Rushen*, 760 F.2d 1009, 1011 (9th Cir. 1985) (Kennedy, J.); *Young* v. *Lane*, 922 F.2d 370, 373 n.7 (7th Cir. 1991); *Ross* v. *Reed*, 719 F.2d 689, 694 (4th Cir. 1983). Martin himself was incarcerated from 1981 until early 1992, which would ordinarily be ample time to resolve a claim such as the one presented in this case.[5]

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[5] It should be noted that Martin substantially delayed commencement of this litigation even after the challenged restrictions became an issue. Petitioners were specifically advised of the regulations at least as early as 1986, when Martin first wrote an article for the Chronicle. Rather than challenging the regulations at that time, however, Martin simply continued to violate them, secretly funneling payments for his articles through his attorney. Tr. 3-279 to 3-280, 3-398, 7-1238.

The same reasoning answers the Chronicle's argument, Pet. 9, 17, that it retains an independent interest in the case because the fact pattern is "capable of repetition" with respect to other (unidentified) inmate authors. In this regard, the Chronicle inexplicably relies on a letter from the BOP, sent after the judgment in the district court, expressing concern that the continuing publication of Martin's articles (without a byline but with details sufficient in context to identify the author) could cause a security problem in the prison to which Martin had been transferred. See Pet. App. 67-68. The letter refers only to the specific security problems arising with respect to Martin, and it gives no indication of any continuing dispute with the Chronicle that would extend beyond Martin's release on parole.

Nor is the possibility that Martin may violate the terms of his parole and be reincarcerated, so that he would again be subjected to the restrictions of the federal prison regulations, sufficient to prevent the case from being moot. The mere possibility of reincarceration or retransfer cannot preserve a claim for injunctive and declaratory relief regarding prison conditions as a live controversy after a prisoner is transferred or released on parole. See, *e.g.*, *Weinstein* v. *Bradford*, 423 U.S. at 149; *Preiser* v. *Newkirk*, *supra*; *Dorman* v. *Thornburgh*, 955 F.2d 57, 58 (D.C. Cir. 1992); *Johnson* v. *Moore*, 948 F.2d 517, 519 (9th Cir. 1991). With respect to equitable relief, such

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It was not until two years later, after prison officials discovered financial records showing the continuing payments, that petitioners chose to challenge the regulations in court.

a live controversy requires a continuing, present injury, or a real and immediate threat of repeated injury. *E.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). The possibility of return to prison for a new violation is "too speculative * * *, and as such cannot be the basis for a finding that the case continues to present a justiciable question." *Wiggins* v. *Rushen*, 760 F.2d at 1011. See *O'Shea*, 414 U.S. at 496-497; *Cox* v. *McCarthy*, 829 F.2d 800, 804 & n.3 (9th Cir. 1987); *Darring* v. *Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986); *Ross* v. *Reed*, *supra*. Given the lack of any evidence indicating an unusual likelihood of reincarceration, the court of appeals properly found the case to be moot.

b. Contrary to petitioners' assertion, Pet. 18-19, the decision below does not conflict with those of other courts of appeals.[6]

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[6] Although any intra-circuit conflict would of course not require the intervention of this Court, petitioners' suggestion, Pet. 19 n.20, that the decision below departs from Ninth Circuit precedent is also without merit. See *Johnson* v. *Moore*, 948 F.2d at 519 (where transferred prisoner "demonstrated no reasonable expectation of returning," claims for injunctive relief were moot); *Wiggins* v. *Rushen*, *supra* (inmate's complaint for an injunction became moot upon transfer and parole, even where new charges had already been filed against him). In *Workman* v. *Mitchell*, 502 F.2d 1201 (9th Cir. 1974), the suit was not mooted by the release of the named inmate plaintiffs because, unlike this case, *Workman* was a class action. See *Sosna* v. *Iowa*, 419 U.S. 393 (1975). The *Workman* court's passing reference (502 F.2d at 1207 n.7) to the Seventh Circuit's decision in *Morales* v. *Schmidt*, 489 F.2d 1335 (1973), aff'd on rehearing en banc, 494 F.2d 85 (1974), is simply erroneous dictum that does not establish even an intracircuit conflict. While the similarly brief reference to the issue in

The Seventh Circuit follows the general rule set forth above. See, *e.g.*, *Young* v. *Lane*, 922 F.2d 370, 373 & n.7 (1991) (transfer of prisoners mooted claims for injunctive relief). Petitioners cite that court's decision in *Morales* v. *Schmidt*, 489 F.2d 1335 (1973), aff'd on rehearing en banc, 494 F.2d 85 (7th Cir. 1974). *Morales*, however, involved mailing restrictions that had a continuing effect on the former prisoner even while he was on parole. The court made clear that prison officials would "have legal custody of the plaintiff, although a parolee, for six more years and [have] authority to impose restrictions upon him," and that the official in question had in fact "stated that he has refrained from preventing Morales from communicating with his sister-in-law solely because of the duty to comply with the district court's injunction." 489 F.2d at 1336. *Morales* thus stands only for the unremarkable proposition that parole of a prisoner will not moot a challenge to governmental regulations that continue to restrict his activities.[7]

Petitioners also cite *Chapman* v. *Pickett*, 586 F.2d 22 (7th Cir. 1978). *Chapman* held that a portion of a paroled prisoner's declaratory claim was not moot because of the possibility that records of disciplinary

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Diamontiney v. *Borg*, 918 F.2d 793, 795 n.1 (9th Cir. 1990), is somewhat unclear, that case was held not to be moot apparently because, as discussed in the text with respect to *Morales*, the challenged mail policies could "still have an impact on [the former prisoner's] correspondence with the courts."

[7] The *Morales* court did note the possibility that the parolee might be returned to prison after a future infraction. It did not, however, indicate that that possibility by itself would suffice to prevent the case from being moot.

action taken against him would be used against him in the future. *Id.* at 26-27. Because Martin was never disciplined for his violation of the byline and compensation regulations, there can be no such claim of a continuing adverse effect in this case. Thus, regardless of its merits, *Chapman*'s holding is not applicable here.

The Tenth Circuit's decision in *McKinney* v. *Maynard*, 952 F.2d 350 (1991), is also consistent with the decision below. Unlike petitioner Martin, McKinney had not been released on parole at the time of the court of appeals' decision; rather, he had been transferred to another facility and placed on "pre-parole" status for a number of months. It appears from the court's brief discussion of the point, which is based largely on a citation to *Morales*, that in that status McKinney, like Morales but unlike Martin, remained subject to the terms of the challenged regulations. *Id.* at 351 n.1.

3. Petitioners also contend, Pet. 20-22, that there is a continuing controversy regarding damages in this case. An inmate's claim for damages for past illegal conduct is not, of course, mooted by his release or transfer. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). In this case, however, Martin's claim for damages was resolved adversely to him in the district court and the court's findings on the damages issue were not challenged on appeal.

In the district court, Martin's damages claim was founded upon the allegation that his placement in administrative detention and his transfer to another prison denied him due process, and that the actions were intended as punishment to retaliate against him

for the content of his writing. The district court specifically rejected those contentions, finding that the "defendants acted because of a genuine concern for prison security and for no other reason." Pet. App. 30. See Pet. App. 30-35, 38-39. Petitioners' appeal to the Ninth Circuit did not challenge these findings, but raised only issues related to the claims for injunctive and declaratory relief. Because the trial court's factual findings dictate rejection of the damages claim and were not challenged on appeal, there is no continuing controversy as to the award of damages.

Now that mootness has become an issue in the case, petitioners have suggested that the damages claim was not limited to the alleged retaliation. Pet. 20. While there is arguably broader language included in the complaint, petitioners' pretrial statement clearly identifies the alleged retaliation as the basis of the damages action:

> The damages phase concerns whether Defendants retaliated against Plaintiffs' First Amendment activities and, if so, what damages should be awarded.
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> * * * * *
>
> [In the damages phase] [i]t probably would be left for the jury to determine whether Defendants had retaliated against Plaintiffs' expression of their First Amendment rights * * *.

Pretrial Statement 9-10.

Moreover, under the facts of this case, no viable damages claim could have been advanced except under

the retaliation theory. This case is not the typical one in which damages are sought based on the past application of regulations to a prisoner. Through June 1988, the Chronicle and Martin chose to ignore and evade the regulations. Shortly thereafter, petitioners filed this suit and promptly obtained a temporary restraining order and subsequent preliminary injunction barring application of the regulations to Martin while the case was pending. Accordingly, prior to final judgment in the district court, Martin continued to receive compensation and have articles published under his byline unimpeded by the challenged regulations. Because the regulations were not in fact applied to him, he could not have suffered any injury from their application.

Petitioners' claim is further foreclosed by the qualified immunity of the respondent BOP employees. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). For the reasons expressed in the district court's factual findings and opinion upholding the constitutionality of the challenged regulations, and given the lack of any contrary authority, it is evident that the respondent BOP employees' conduct in applying the BOP regulations in a non-retaliatory manner did not violate any clearly established constitutional rights of which a reasonable person would have been aware. Accordingly, any damages claim predicated on such good-faith enforcement of the regulations is not viable. Petitioners fault the court below for not addressing, or remanding for further proceedings on, the qualified immunity issue. Pet. 20-21. As discussed above, however, petitioners' damages claim had been resolved in the district court on other sufficient

grounds and, in any event, there is no serious argument on the qualified immunity question that would have warranted discussion or remand by the court below.

4. Finally, petitioners contend, Pet. 17, 22 n.22, that regardless of Martin's continuing interest in the case, the Chronicle's independent interest prevents the case from becoming moot upon Martin's release. Given Martin's release, however, the Chronicle has demonstrated no present or continuing injury, nor any "real" or "immediate" threat of repeated injury from application of the allegedly unconstitutional regulations. See *Los Angeles* v. *Lyons*, 461 U.S. at 101-102; *O'Shea* v. *Littleton*, *supra*. Absent its ongoing business relationship with Martin or another actual inmate writer, the Chronicle cannot continue to prosecute the suit. See *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975); *Darring* v. *Kincheloe*, 783 F.2d at 877.

The Chronicle's vague assertions that it "maintains an interest in reporting about prisons," Pet. 17, or is "very much interested in publishing pieces by convicts," Pet. App. 63, do not identify the sort of "specific live grievance" required to preserve federal jurisdiction, *Lewis* v. *Continental Bank Corp.*, 494 U.S. at 479 (quoting *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969)), but rather enter "the area of speculation and conjecture." *O'Shea* v. *Littleton*, 414 U.S. at 497. The Chronicle has not named any particular federal inmate who has submitted an article it would publish but for the regulations; it has not stated that there is any actual federal inmate author it wishes to compensate but cannot; and it has not averred that

there is any federal inmate author making submissions for whom a byline under a pseudonym would be insufficient. On the record of this case, there is no substantial controversy of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden* v. *Zwickler*, 394 U.S. at 108.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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